Supreme Court, U.S.
FILED

(1)

No. 95-2081 JUN 25 '96

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

WILLIAM H. WILLIAMS, III,

Petitioner,

v.

SAN GORGONIO FARMS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of the
State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of California's arbitration statutes (Title 9 of Part III of the California Code of Civil Procedure) to allow the arbitrator to rewrite the express terms of Petitioner's contract with Respondent violates the Contract Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed on the cover of this Petition. There are no parent or wholly-owned subsidiary corporations of the corporate Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner William H. Williams, III ("Petitioner") respectfully requests that a Writ of Certiorari issue to review the Opinion of the California Court of Appeal for the Second District (Division One), entered in this case on December 7, 1995 and the denial of review by the California Supreme Court entered on March 27, 1996.

OPINIONS BELOW

The trial court's Judgment was entered on December 2, 1994. The Court of Appeal's Opinion was entered on December 7, 1995. The California Supreme Court's Order denying Petitioner's Petition for Writ of Certiorari was entered on March 27, 1996. None of those Orders or Opinions has been reported officially or unofficially. All are set forth in the Appendix hereto. No motion for rehearing was filed.

JURISDICTION

This Court has jurisdiction to review on a Writ of Certiorari the Orders in question pursuant to Article I, Section 10, Clause 1 of the United States Constitution (the "Contract Clause"), which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

It has long been held that a federal question is raised by an unsuccessful contention in a state court that the obligations of a contract have been impaired by state statute. Detroit United Railway v. Michigan (1916) 242

U.S. 238, 246-248, 61 L.Ed. 268, 272-273; Irving Trust Co. v. Day (1941) 314 U.S. 556, 561, 86 L.Ed. 452, 457.

STATEMENT OF THE CASE

This Petition presents for the Court's consideration an issue under the Contract Clause of the United States Constitution. Specifically, Petitioner contends that CAL. CODE OF CIV. PROC. § 1286.2, as given effect by the courts of the State of California in application to the contract between him and Respondent, has substantially impaired the obligations of that contract in violation of the United States Constitution by permitting and sanctioning the rewriting of the express provisions of the contract.

CAL. CODE OF CIV. PROC. § 1286.2 provides, in pertinent part, as follows:

> "The court shall vacate the award if the court determines any of the following:
>
> . . .
>
> "(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. . . . "

Petitioner sought the vacation or correction of the arbitrator's Award in this case on that ground based on the arbitrator's rewriting of the express language of the contract.

The Court of Appeal, in spite of its finding that the arbitrator's interpretation of the contract was "not supported by any reasonable interpretation of the unambiguous contract language" (Appendix, p. 10), affirmed the trial court's denial of the Petition to Vacate or Correct the Arbitration Award, thus holding that the arbitrator did not exceed his powers by rewriting the language of the contract. In so doing, the Court of Appeal gave effect to CAL. CODE OF CIV. PROC. § 1286.2 in such a manner as to substantially impair Petitioner's contract in violation of the United States Constitution.

Petitioner is the owner of five wind turbine generators or windmills (the "WTG's) which he purchased from Respondent (two in 1984 and three in 1985). Respondent maintains and operates the WTG's pursuant to three separate written agreements between Petitioner and Respondent. Those agreements set forth specific provisions for the services to be performed by Respondent for the management and maintenance of the WTG's and the method of compensation for those services. Specifically, the agreements provide that Petitioner will pay to Respondent a maintenance fee equal to the actual costs incurred for maintenance of a particular WTG by Respondent plus a stated percentage (15%) of those costs.

On October 26, 1990, Respondent's President, William W. Adams ("Adams"), wrote to Petitioner (and all other WTG owners) and advised that beginning January 1991, Respondent intended to "pool" all maintenance expenses for all

WTG's. Adams enclosed an amendment to the agreements and requested that Petitioner sign and return it "to allow for pooling of maintenance charges."

Petitioner did not agree to the amendment and did not sign and return the amendment. Petitioner told Adams that he would not agree to the pooling arrangement.

Despite Petitioner's rejection of the proposed amendment, Respondent began deducting a flat percentage of gross revenues for each machine (ranging over time from 30% up to 60%) and "pooled" the maintenance charges for all WTG's in the wind park, even though it acknowledged it did not have the right to do so.

In February 1993, pursuant to written agreement, Petitioner submitted a Demand for Arbitration to Respondent and the American Arbitration Association.

Among the issues submitted to the arbitrator was whether the written agreements between Petitioner and Respondent provided for the pooling of maintenance expenses. The arbitrator awarded Petitioner damages in the amount of $10,971.90, without any explanation as to the computation of that amount and denied all other requests for relief.

The particular contractual provision at issue here provides as follows:

> "(b) Commencing the first month of the sixth year of the term hereof, [Petitioner] shall pay, for maintenance services and insurance, in lieu of the

> amount provided under the foregoing subparagraph [which provides for a specified flat percentage of revenue for years one through five], [Respondent's] actual expenditures and costs for insurance premiums, labor, supervision and parts expended by [Respondent] in performing the services required of [Respondent] under paragraph 3.01 hereof plus a maintenance service fee equal to 15% of such expenditures and costs. [Respondent] shall render a monthly statement to [Petitioner] showing hours of labor and supervision performed by [Respondent's] employees, purchased labor and parts, and [Respondent's] costs thereof plus [Respondent's] maintenance service fee and [Petitioner's] pro rata portion of insurance premiums paid. Such statements shall be payable upon receipt."

The arbitration hearing was held on November 1 and 2, 1993, in Los Angeles, California, before Ted T. Ward, arbitrator. On December 14, 1993, the arbitrator rendered the Arbitration Award.

Petitioner filed a Petition to Vacate or Correct Arbitration Award (the "Petition to Vacate") in the Los Angeles County Superior Court on the grounds that the arbitrator exceeded his powers in reaching his Award by rewriting the express terms of the contract.

The hearing on the Petition to Vacate was held on May 4, 1994, before the Honorable Paul Boland, Judge of the Los Angeles County Superior Court. The Superior Court denied the Petition to Vacate, ruling that the arbitrator did not exceed his powers and that the arbitrator's construction of the agreements was "within the bounds of reasonableness and permissibility."

The Order Denying Petition was entered by the Superior Court on May 9, 1994.

The Superior Court entered Judgment confirming the Award on December 2, 1994.

Notice of Entry of Judgment was filed and served, and Petitioner filed his Notice of Appeal on January 5, 1995 on the grounds that the Superior Court erred in failing to vacate or correct the Award due to the arbitrator's rewriting of the contract in excess of his powers.

The Court of Appeal rendered its Opinion affirming the trial court's Order on December 7, 1995. The Court of Appeal's Opinion became final on January 6, 1996.

The Court of Appeal, in reviewing the contract in question, found that the arbitrator's interpretation of the specific provisions at issue "is not supported by any reasonable interpretation of the unambiguous contract language." (Appendix, p. 10.)

Yet, the Court of Appeal declined to order the Award vacated or corrected, thus interpreting the statute in such a

manner as to effect a substantial impairment of Petitioner's contract in violation of the Contract Clause.

On January 16, 1996, Petitioner filed a Petition for Review with the California Supreme Court, again on the grounds that the arbitrator had exceeded his powers by rewriting the contract.

On March 27, 1996, the California Supreme Court filed its Denial of Petitioner's Petition for Review. Thus, while acknowledging that the arbitrator's interpretation of the contract provisions at issue is "not supported by any reasonable interpretation of the unambiguous contract language", the highest state courts of the State of California have given to CAL. CODE OF CIV. PROC. § 1286.2 an effect which substantially impairs the obligations of Petitioner's contract in violation of United States Constitution, Article I, Section 10, Clause 1.

ARGUMENT

This Petition is presented to the Court under the Contract Clause of the United States Constitution, a clause which has been perceived to have receded in importance over the past century of jurisprudence in this country, at least until the last 20 years.

This Petition comes to the Court in the context of arbitration, a dispute resolution mechanism which has grown in popularity and perceived importance over the past 20 years.

Petitioner's constitutional right to contract has been trampled in the stampede toward "arbitral finality" which has been precipitated by the huge burden under which our state courts, including particularly those of California, are laboring.

In California, arbitration is a much promoted method of dispute resolution. The California Legislature has enacted a legislative scheme designed to promote arbitral finality. One component of that scheme is embodied in CAL. CODE OF CIV. PROC. § 1286.2 which sets forth the grounds upon which an arbitration award can be vacated. Under that section, vacating of an arbitration award is authorized where the arbitrator exceeds his powers.

The California Court of Appeal and the California Supreme Court have applied CAL. CODE OF CIV. PROC. § 1286.2 to Petitioner's contract in such a manner as to substantially impair the obligations of Petitioner's contract. By holding that although the arbitrator has clearly rewritten the express provisions of the contract, he has not exceeded his powers, the California Court of Appeal and the California Supreme Court have given a substantially impairing effect to CAL. CODE OF CIV. PROC. § 1286.2.

The Contract Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation . . . ." Allied Structural Steel Co. v. Spannaus (1978) 438 U.S. 234, 241, 57 L.Ed.2d. 727, 734.

The importance given to the Contract Clause in the early days of our Republic should not be ignored by this Court. If judicial history has any value at all, it is to remind us of the origins of constitutional and democratic thought as memorialized in the Constitution. It must be admitted that as our country and society have grown, in size and in complexity, our emphasis may have shifted from time to time. Nonetheless, we must not lose sight of the fundamental precepts on which our country was founded. The best source of knowledge of those foundations is the early jurisprudence of this country. The importance given to the Contract Clause in that early jurisprudence should not be ignored.

In 1877, this Court wrote that:

> "There is no more important provision in the Federal Constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

Murray v. Charleston (1877) 96 U.S. 432, 448-449, 24 L.Ed. 760, 764.

This "highest duty" flows logically from our federal system itself, a system in which the states are given autonomy subject to rights and duties reserved to the branches of the Federal Government by the United States Constitution. It is only the Constitution which prevents states from passing laws which would impair contracts. Canada Southern R.R. Co. v. Gebhard (1883) 109 U.S. 527, 535, 27 L.Ed. 1020, 1023.

This Court recognized that fact again in Carondelet Canal and Nav. Co. v. Louisiana (1913) 233 U.S. 362, 378, 58 L.Ed. 1001, 1007, when it stated as follows:

> "The provision of the Constitution against the impairment of the obligation of contracts was intended 'to prohibit every mode or device having such purpose. The prohibition is universal. It attempted no enumeration of the modes by which contracts might be impaired. It would have been unwise to make such enumeration, since it might have been defective.' [Citation omitted.] The precaution was necessary. The prohibition is directed against exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, whether boldly declared

in an explicit law or disguised in an ambiguous form."

Given the early pronouncements of the importance of the Contract Clause and the more recent re-embracing of the Contract Clause in cases such as Allied Structural Steel Co. v. Spannaus, supra, can there be any question that a law which has the effect of stripping a citizen of the right to contract, superimposing the will of others as to the terms of his contract, and giving him no recourse, acts as a substantial impairment to the right to contract?

A lengthy discussion of the Contract Clause can be found in Home Building and Loan Association v. Blaisdell (1933) 290 U.S. 398, 78 L.Ed. 413. Although the Court found no violation of the Contract Clause, it recognized its importance and continuing viability. Justice Sutherland, disagreeing with the Court's conclusion though not its reasoning, stated in his dissenting opinion at 290 U.S. 482, 78 L.Ed. 452:

> "The phrase, 'obligation of a contract' in the constitutional sense imports a legal duty to perform the specified obligation of that contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other.

> It cannot do so either by acting directly upon the contract, or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear." (Emphasis in original.)

This Court's jurisdiction as to matters within the Contract Clause is unquestionable. As stated by the Court in Murray v. Charleston, supra, at 96 U.S. 441:

> "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the federal constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded, under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of minor importance if, in fact, it was raised and decided. . . .
>
> "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court express and assert a right under the federal constitution. The true

test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a state court when a determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the federal question was formerly raised."

The jurisdiction of this Court in cases of this type

"does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation." Detroit United Railway v. Michigan (1916) 242 U.S. 238, 247, 61 L.Ed. 268, 273.

It has been stated that it is the duty of this Court, where the Contract Clause is invoked, to determine for itself what the contract is and whether it has been impaired. Funkhouser v. J.B. Preston Co. (1933) 290 U.S. 163, 167, 78 L.Ed. 243, 245, and cases cited there.

In Ogden v. Saunders (1827) 12 Wheat. 213, 354-355, 6 L.Ed. 606, 654-655, Chief Justice Marshall made the following comments on the importance of the Contract Clause:

> "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, have been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the

important benefits expected from a reform of the government."

This nation is rapidly returning to the condition observed by Chief Justice Marshall (with the unfortunate exception that there no longer appear to be among us "the truly wise" or "the virtuous"). This time, the engine of destruction is the overburgeoning police power which has come to be the justification for deprivation of all personal liberties. As a nation, we are in danger of surrendering ourselves to a police state where the words of our contracts can be changed to suit the whims of others, where one individual can impose his will on another, where the minority can impose its will on the majority, and where no recourse is left to the individual. The law-abiding individual, once the cornerstone of our democracy and the lifeblood of our society, has been lost in the grotesque parade of criminals, deviants, thieves and miscreants who clamor for and receive the attention of virtually every institution in this country, including, most specifically, the courts. This Petition must certainly appear mundane and drab, garbed only in simple facts and a single out-of-favor Constitutional principle, and carried by an average man, dressed only in a business suit, to the august halls of this Court. It is nonetheless, or perhaps all the more so, worthy of this Court's attention.

PRAYER

Petitioner respectfully prays that this Court issue its Writ of Certiorari in this matter.

DATED: June 25, 1996.

Respectfully submitted,

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APPENDIX

Second Appellate District, Division One,
No. B090324

S051197

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM H. WILLIAMS III, Appellant

v.

SAN GORGONIO FARMS INC., Respondent

SUPREME COURT
FILED
MAR 27 1996
Robert Wandruff Clerk

DEPUTY

Petition for review DENIED.

/s/ LUCAS
Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

WILLIAM H. WILLIAMS III,	)	B090324
	)	
	)	(Super.Ct.No.
Petitioner and Appellant,	)	BS027881)
	)	
	)	COURT OF APPEAL
v.	)	SECOND DIST.
	)	F I L E D
SAN GORGONIO FARMS, INC.,	)	DEC 7 1995
	)	JOSEPH A. LANE
	)	CLERK
Respondent.	)	
	)	

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul Boland, Judge. Affirmed.

Seed, Mackall & Cole, Peter A. Umoff and Sandra Hitchens Thoits for Petitioner and Appellant.

Bence & Morales and David R. Bence for Respondent.

INTRODUCTION

Petitioner William H. Williams III appeals from a judgment entered after the trial court confirmed an arbitration award. Petitioner sought to vacate the award on the ground the arbitrator

exceeded his powers. The court denied the petition.

STATEMENT OF FACTS

Petitioner purchased five wind turbines from respondent. Thereafter, petitioner contracted with respondent to maintain and repair the turbines, which were located in respondent's wind park. The contracts limit respondent's compensation for this service during the first five years to 10 percent of each wind turbine's gross revenues. "Commencing with the first month of the sixth year of the term hereof, [petitioner] shall pay, for maintenance services and insurance, . . . [respondent's] actual expenditures and costs for insurance premiums." Respondent also is entitled to a service fee equivalent to 15 percent of its repair and maintenance expenditures.

As the sixth year of the contract term approached, respondent sought petitioner's agreement to a pooling arrangement. Rather than bill petitioner and other owners monthly, respondent proposed to use its experience to estimate how much money would be necessary to keep the turbines operating and deduct this sum from each owner's monthly revenues. When petitioner refused to agree to this arrangement, respondent embarked upon it anyway.

Petitioner viewed this as a breach of contract. He sought arbitration of the matter as provided for in the contracts. There was a great deal of evidence, and the arbitrator apparently found, that the pooling arrangement had

not cost petitioner any more than would the approach outlined in the contract. To date, he actually had benefited from it, in that insufficient money had been withheld from his revenues to pay for all the repairs performed. The arbitrator awarded petitioner $10,971.90 on his claim that excess maintenance charges had been taken during years one through five of the contract term and denied all other claims.

CONTENTIONS

I

Petitioner contends the trial court erred in accepting defendant's late response to the petition to vacate the arbitration award, rather than deeming the allegations of the petition admitted as a matter of law.

II

Petitioner asserts the trial court erred in denying the motion to vacate or correct the arbitration award, in that the arbitrator clearly exceeded his powers.

DISCUSSION

I

Petitioner contends the trial court erred in accepting defendant's late response to the petition to vacate the arbitration award, rather than deeming the allegations of the petition admitted as a matter of law. We disagree.

Code of Civil Procedure section 1290 provides that the allegations of a petition to confirm, vacate or correct an arbitration award "are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed...." Under Code of Civil Procedure section 1290.6, "[a] response shall be served and filed within 10 days after service of the petition.... The time provided in this section for serving and filing a response may be extended...for good cause, or by order of the court." A court has the power to grant relief from the consequences of the untimely filing pursuant to its inherent equitable power or Code of Civil Procedure section 473. *(DeMello v. Souza* (1973) 36 Cal.App.3d 79, 84; *Coordinated Construction, Inc. v. Canoga Big "A,", Inc.* (1965) 238 Cal.App.2d 313, 319.)

Code of Civil Procedure section 473 permits a party to seek relief from a judicial act resulting from the party's "mistake, inadvertence, surprise, or excusable neglect." Whether to grant relief lies within the trial court's sound discretion. The decision will not be reversed on appeal unless the trial court clearly has abused its discretion and the determination exceeds the bounds of reason under the circumstances. *(In re Marriage of Connolly* (1979) 23 Cal.3d 590, 597-598; *Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 803; *Coordinated Construction, Inc. v. Canoga Big "A," Inc., supra,* 238 Cal.App.2d at p. 319.) The court's discretion must be exercised to conform to the spirit of the law, to subserve and not impede or defeat the ends of substantial justice. *(Elston v. City of Turlock* (1985) 38 Cal.3d 227,

233; *Brochtrup v. INTEP* (1987) 190 Cal.App.3d 323, 329.) Inasmuch as there is a strong policy favoring relief from default, section 473 should be applied liberally. *(Carrasco, supra,* at p. 803.)

A party seeking relief under section 473 on the basis of mistake generally must demonstrate that the mistake was excusable. *(Buckert v. Briggs* (1971) 15 Cal.App.3d 296, 301.) It must be one which might have been made by a reasonably prudent person in the same circumstances. *(Dingwall v. Vangas, Inc.* (1963) 218 Cal.App.2d 108, 113.) It must appear affirmatively from the evidence; it will not suffice in the abstract. (Cf. *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 900.)

The reply to the petition was due on April 4, 1984, inasmuch as the tenth day, April 3, fell on a Sunday. (Code Civ. Proc., § 10.) Respondent did not file the response until April 8. Once respondent failed to duly serve and file a response on April 4, the allegations of the petition were deemed admitted. Respondent sought relief from this judicial act by filing the response on April 8 and requesting therein that the court accept it as timely. Counsel declared, "Perhaps as a result of the Easter holiday which occurred April 3, 1994, I miscalendared the response date for this response. I calendared a response date ten court days from receipt of the petition, which was April 8, 1994, rather than the ten calendar days required.... I noticed this error on April 7...."

A mistake in calendaring of this sort generally has been deemed excusable. (See, e.g., *Palmer v. Moore* (1968) 266 Cal.App.2d 134, 141; *Barnes v.* Witt (1962) 207 Cal.App.2d 441, 447-448.) It is the sort of mistake or inadvertence that might be made by a reasonably prudent person in the same circumstances. *(Dingwall v. Vangas, Inc., supra,* 218 Cal.App.2d at p. 113.) It thus was not a clear abuse of discretion for the court to relieve respondent from the consequences of untimely filing its response.

II

Petitioner asserts the trial court erred in denying the motion to vacate or correct the arbitration award, in that the arbitrator clearly exceeded his powers. The assertion lacks merit.

The extent to which a nonjudicial arbitration award may be attacked is limited by statute. As the court notes in *Moncharsh v. Heily & Blase (1992) 3* Cal.4th 1, "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (At p.6.) Judicial review is limited in this fashion because private arbitration is a matter of agreement among the parties. Finality attaches to arbitration awards based on the strong public policy in favor of arbitration as an expeditious and relatively inexpensive method of dispute resolution, the parties' express or implied agreement that the arbitrator's decision will be final and binding, and recognition that

an arbitrator may decide a matter on principles of equity and conscience, unconstrained by rules of law. (*Id.* at p.11.)

As pertinent to this case, the award must be vacated if the arbitrator exceeded his or her powers "and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (Code Civ. Proc., § 1286.2, subd. (d).) If it can be corrected, however, it must be corrected. (*Id.*, § 1286.6, subd.(b).) As noted in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, "Recent decisions...have employed two formulas to determine whether an arbitrator's award exceeded his or her powers. The courts have asked whether the award rests on a 'completely irrational' construction of the contract [citations] or whether it amounts to an 'arbitrary remaking' of the contract [citations]. These tests were combined...into a single formula: 'Generally, a decision exceeds the arbitrator's powers only if it is so utterly irrational that it amounts to an arbitrary remaking of the contract between the parties.'" (At pp. 376-377.) Nonetheless, "arbitrators do not exceed their power by erroneously interpreting a contract.... [A]rbitrators...exceed[] their power...only where the arbitrators' interpretation or application of a contract is completely outside [the contract's] scope." (*Blue Cross of California v. Jones* (1993) 19 Cal.App.4th 220, 229.)

Petitioner pursued arbitration of three matters: purported excess maintenance charges taken during years

one through five of his contract (the arbitrator awarded him $10,971.90 on this claim), purported excess charges taken during years six through nine (he received no award on this claim) and a declaration of rights in his favor (the arbitrator also denied this claim). It is the arbitrator's refusal to declare rights in his favor that forms the basis for petitioner's attack on the arbitration award.

Petitioner's contract imposes substantial repair and maintenance obligations on respondent, but "[c]ommencing with the first month of the sixth year of the term hereof, [petitioner] shall pay, for maintenance services and insurance, ...[respondent's] actual expenditures and costs for insurance premiums. Labor, supervision and parts expended by [respondent] in performing the services required of [respondent] under paragraph 3.01 hereof, plus a maintenance service fee equal to fifteen per cent (15%) of such expenditures and costs. [Respondent] shall render a monthly statement to [petitioner] showing hours of labor and supervision performed by [respondent's] employees, purchased labor and parts and [respondent's] costs thereof plus [respondent's] maintenance service fee and [petitioner's] pro rata portion of insurance premiums paid. Such statement shall be payable upon receipt."

As the sixth year of the contractual term approached, respondent sought petitioner's agreement to a pooling arrangement. Rather than bill petitioner and other wind turbine owners monthly, respondent proposed to use its experience

to estimate how much money would be necessary to keep the turbines operating and deduct this sum from each owner's monthly revenues. When petitioner refused to agree to this arrangement, respondent embarked upon it anyway.

There was a great deal of evidence, and the arbitrator apparently found, that this approach had not cost petitioner any more than would the approach outlined in the contract. To date, he actually had benefited from it, in that insufficient money had been withheld from his revenues to pay for all the repairs performed. Over time, the money deducted would match all repair and maintenance expenses, but, again as measured over time, it would not exceed them. Managing the wind park in this fashion resulted in greater operating efficiency and, consequently, greater revenues for the turbine owners.

The arbitrator's acceptance of the pooling arrangement is not supported by any reasonable interpretation of the unambiguous contract language. It thus is erroneous. It is not completely outside the contract's scope, however *(Blue Cross of California v. Jones, supra,* 19 Cal.App.4th at p. 229), and thus is not "'so utterly irrational that it amounts to an arbitrary remaking of the contract'" *(Advanced Micro Devices, Inc. v. Intel Corp., supra, 9* Cal.4th at p. 377). Under either approach, that set forth in the contract or that adopted by respondent, petitioner must pay all repair and maintenance expenses plus a 15 percent service fee, but—over time—no more than that. Petitioner incurs no new obligations or liabilities. The

arbitrator's interpretation thus is not the equivalent of an award requiring the delivery of benefits under the contract without regard to the financial limitations imposed by the contract. (See, e.g., *Blue Cross of California, supra*. at p. 229.) In short, the arbitrator did not exceed his powers.

Respondent requests an award of attorney's fees to which it is entitled under the parties' contracts. The contracts do provide that, in the event litigation is necessary, the prevailing party is entitled to recover attorney's fees. As the prevailing party on appeal, respondent is entitled to reasonable attorney's fees incurred in handling the appeal. *(Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 842.) The better practice is to remand the question of what constitutes reasonable fees to the trial court for determination. *(Schoolcraft v. Ross* (1978) 81 Cal.3d 75, 82.)

The judgment is affirmed. The trial court is directed to determine a reasonable sum to be awarded respondent as attorney's fees incurred on appeal.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

VOGEL (Miriam A.), J.

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ORIGINAL FILED
DEC 02 1994
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In the Matter of the Arbitration between WILLIAM H. WILLIAMS, III Petitioner, v. SAN GORGONIO FARMS, INC. Respondent.	Case No.BS027881 JUDGMENT

The Award of Ted T. Ward, Arbitrator, having been confirmed by Stipulation and Order of this Court,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment be entered in conformity with the confirmed Award, as follows:

1. SAN GORGONIO FARMS, INC. shall pay to WILLIAM H. WILLIAMS, III the sum of $10,971.90,

2. Neither party shall recover any punitive damages,

3. Neither party shall recover any attorney fees,

4. Each party shall pay 50% of arbitration fees and 50% of arbitrator's fees,

5. All other claims are denied.

DATED: DEC 02 1994 .

/s/JUDGE PAUL BOLAND
Paul Boland
Judge of the Superior Court

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF WILLIAM H. WILLIAMS AND SAN GORGONIO FARMS, INC.

CASE NO. 72 199 0114 93 WU

ARBITRATION AWARD

The arbitrator, having considered all oral and written evidence presented in the course of hearing, including closing arguments of each party, hereby renders the following award:

1. San Gorgonio Farms, Inc. shall pay to Williams the sum of $10,971.90,

2. Neither party shall recover any punitive damages,

3. Neither party shall recover any attorney fees,

4. Each party shall pay 50% of arbitration fees and 50% of arbitrator's fees,

5. All other claims are denied.

Dated at Los Angeles, California this 14th day of December 1993.

/s/ Ted T. Ward
Ted T. Ward
Arbitrator

/S2083A